

Insurers liabilities under section 138 ACA set to increase

- Alcoa under fire

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Without consultation or warning, a Bill was introduced into Parliament on 9 September 2008 which, if passed, will increase the liability of insurers of third parties joined to a Victorian Workcover Authority (VWA) section 138 Accident Compensation Act 1985 (Vic) action. Under section 138 VWA has a right to reclaim payments made now and in the future to injured workers from parties guilty of negligence.

These actions, which comprise the bulk of public liability litigation in Victoria, account for a significant proportion of most insurer's casualty book. Many of these actions are substantial – up to seven figures.

The background

In 2003, tort law reform was introduced in Victoria.

Amendments to the **Wrongs Act 1958 (Vic)** introduced caps on damages, restrictions on personal attendant care damages, a 5% discount rate for calculating future loss instead of the 3% discount rate (**Part VB**), impairment thresholds so only claimants with “*significant injuries*” could recover general damages (however, the entitlement to recover financial loss remained) (**Part VBA**) and codification of aspects of “negligence” (**Part X**).

In *Alcoa Portland Aluminium Pty Ltd v Victorian WorkCover Authority* [2007] VSCA 210 (11 October 2007), the Victorian Supreme Court of Appeal held, unanimously, that VWA's entitlements under section 138 must be calculated with reference to Part VB.

The Court was not required to consider and therefore did not decide whether Part VBA and Part X must also be taken into account. However, it is widely argued (over VWA's opposition) that they must.

The effect of *Alcoa* differs from case to case. However, for an insurer with a portfolio of section 138 recovery actions, its impact was considerable as it reduced the calculation of VWA's entitlements in many cases.

The Bill

On 9 September 2008, the Honorable Tim Holding introduced the **Compensation and Superannuation Legislation Amendment Bill 2008**.

On 12 September 2008, the Bill proceeded to second reading speech stage. An introduction print of the Bill is now available.

Debate on the Bill has been adjourned until **Thursday, 25 September 2008** on the motion of Shadow Minister, Mr **Andrew McIntosh MLA**.

The changes proposed

The Bill will overturn the decision in *Alcoa*.

Section 138 will be amended to expressly exclude Parts VB, VBA and X from the calculation of the amount which a third party is required to pay as an indemnity under that section.

It also provides for a similar amendment to be made to Transport Accident Commission's (TAC) recovery entitlements under section 104 **Transport Accident Act** 1986.

The Bill therefore carves out special rights for the VWA and TAC that were removed from other citizens in this state when tort law reform was passed into statute. The assessment of the indemnity pursuant to section 138 will be calculated by reference to old common law rules which are essentially now irrelevant to all other actions commenced in this State.

The changes are retrospective unless:

- + The amount of the indemnity has been determined;
- + Judgment for damages has been given or entered; or
- + There has been a settlement or compromise in the claim in respect of which the right of indemnity arose.

Insurers will need to revisit the claims where negotiations with VWA have not concluded. Issues arise with the retrospectivity provision. For example, it appears to apply to cases where the matter has actually been heard but judgment is pending.

Effect on Insurers

The effect of this Bill is that Insurers' liabilities to VWA will increase.

Existing rights, as confirmed by the *Alcoa* decision, will be removed. The argument that Part VBA and Part X apply to the calculation of the indemnity will no longer be available and VWA's bargaining power will be improved in a regime which is already heavily slanted towards its interests.

Reserves already set by Insurers on the basis of the application of the tort law reform will also need to be reviewed because the amendments apply retrospectively.

This change will also join the long list of benefits VWA has including:

- + An "open-ended" limitation period. The statute of limitation is 6 years from the date of each payment not from the cause of action.
- + Workplace injury law which favors VWA.
- + VWA's right to recover and discharge its compensation liabilities from the third party before it must retain any liability regardless of its employer insured's comparative responsibility for the worker's injury.
- + Evidentiary advantage's which allow VWA to seek discovery and to interrogate third parties but not to reciprocate because it is not subrogated to the rights of its employer insured and brings the action in its own name.
- + A "mathematical error" in the Section 138 formula which means full account is not given for settlement payments made directly to the worker, as was the original intention of the section.

More information

We have set up a short link to the documents on the Parliamentary web-site. The introduction print to the Bill is at <https://tinyurl.com/5h32y1> with the Explanatory Memorandum at <https://tinyurl.com/5alk2n>. To access other documents, go to www.dms.dpc.vic.gov.au and open "Parliamentary Documents" and then "Bills".

If you would like to comment on the Government's actions, you can email the Honorable **Timothy Holding** by emailing him at timothy.holding@parliament.vic.gov.au.

The current Shadow Minister for Finance (including WorkCover and TAC) is **Gordon Rich-Phillips MLC**. His email address is gordon.rich-phillips@parliament.vic.gov.au. You can also email Mr Andrew McIntosh MLA at andrew.mcintosh@parliament.vic.gov.au.

If you would like more information about the Bill and how it may affect you, you can contact Robin Shute (Partner) [(03) 9604 7905] or Andrew Seiter (Senior Associate) [(03) 9604 7906].